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No. 92-520

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

ADAM CHARLES BREMNER, by and through his guardian *ad litem*, Deborah A. Bremner; DEBORAH A. BREMNER; and BRIAN G. BREMNER, Petitioners,

v.

ELLEN CHARLES, M.D.; JOSEPH H. DIEHL, M.D.; and PENDLETON COMMUNITY MEMORIAL HOSPITAL, an Oregon nonprofit corporation, Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

RESPONSE TO PETITION FOR *CERTIORARI*

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TABLE OF CONTENTS

	Page
Introduction.....	1
Statement of the Case.....	2
Response to Petition.....	8
1. This Court is Without Jurisdiction.....	8
A. No Federal Question.....	8
B. Pending State Court Matters.....	10
2. Petitioners Failed to Preserve Any Error Concerning Violation of Either the Seventh or Fourteenth Amendment.....	11
A. This Court Will Not Review an Error Not Preserved Below.....	12
B. Petitioners Did Not Base Their "Exclusion" Assignment of Error on Any Purported Constitutional Violation	14
C. Petitioners Did Not Raise or Preserve Any Federal Question.....	19
3. Petitioners Were Not Deprived of Any Seventh Amendment Right to Jury Trial.....	23

Page

A. The Seventh Amendment Does Not Apply to State Court Actions..... 23

B. Petitioner Adam Bremner Was Afforded a Jury Trial..... 26

Conclusion..... 27

TABLE OF AUTHORITIES

United States Supreme Court Cases

Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 707 (1969)..... 25

Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969)..... 9

Dimick v. Schiedt, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1935)..... 24,25

Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1548 (1943)..... 24,25

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)..... 12

Tacon v. State of Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973)..... 12

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981)..... *passim*

Page

Federal Cases

Marks v. Mobil Oil Corp., 562 F. Supp. 759 (ED Pa 1983)..... 16,17

Other Cases

Bremner v. Charles, 104 Or. App. 75, 799 P.2d 188 (1990)..... 6

Bremner v. Charles, 312 Or. 274, 821 P.2d 1080 (1991)..... 6,7,19

Bremner v. Charles, 313 Or. 339, 832 P.2d 451 (1992)..... 8

Fifth Avenue Corp. v. Washington Co., 282 Or. 591, 581 P.2d 50 (1978)..... 17

Highway Com. v. Helliwell, 225 Or. 588, 358 P.2d 719 (1961)..... 15

Junck v. Wright, 94 Or. App. 704, 767 P.2d 100 rev denied 308 Or. 465 (1989)..... 15

Megdal v. Board of Dental Examiners, 288 Or. 293, 605 P.2d 273 (1980)..... 17

Constitutional and Statutory Provisions

United States Constitution, amend. VII..... *passim*

United States Constitution, amend. XIV..... *passim*

United States Supreme Court Rule 10.1..... 9

	Page
28 U.S.C. § 1257(3)	9
United States Supreme Court Rule 10.1	9
United States Supreme Court Rule 14.1(h)	8,9,21
United States Supreme Court Rule 29.1	2
Oregon Constitution, art. I, sec. 10	7,16
Oregon Constitution, art. I, sec. 17	16,20
Oregon Constitution, art. VII, sec. 3	7,16,20
Oregon Rules of Appellate Procedure 5.45	15
Oregon Rules of Appellate Procedure 14.05	10

INTRODUCTION

Petitioners[1] state the two questions for review are whether the seventh and fourteenth amendments to the United States Constitution permit a state court to exclude a party from his or her trial absent any showing of disruption or any finding of probability of disruption (Petition, p. 1).[2] Petitioners' abstract statement of the issues is neither factually nor procedurally accurate.

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1. The complaint in this case was filed by Adam Bremner's mother, both as Adam Bremner's guardian *ad litem* and on her own behalf. Brian Bremner was dismissed with prejudice before trial. Adam and Deborah Bremner will hereinafter be referred to as "Petitioners."

2. A third issue, according to Petitioners, is not before the Court on this petition. Rather, they raise it only so that it is not construed to be waived in another setting (Petition, p. 11). Therefore, Respondents do not address the third issue in this response.

The only real question raised by the Petition for *Certiorari* is whether Petitioners have preserved any error for review on their argument the Oregon trial court's discretionary ruling violated the seventh and fourteenth amendments of the United States Constitution. The answer is no; these issues were neither raised before nor decided by any Oregon court. There is no federal question affording jurisdiction.

STATEMENT OF THE CASE

This is a medical negligence case originally filed against Respondents[3] in the Umatilla County Circuit Court in the state of Oregon. Petitioner Adam Bremner

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3. Respondents Diehl and Charles are physicians. Respondent Pendleton Community Memorial Hospital is an Oregon nonprofit corporation with no parent or subsidiary companies. Supreme Court Rule 29.1.

was three years old at the time of trial. Petitioners' Fourth Amended Complaint alleged that Petitioner Adam Bremner suffered "intellectual impairment, including mental retardation, seizures, inability to control his limbs (spastic quadriplegia), and dysfunction of other bodily functions."

On Respondents' motion the trial court bifurcated the issues of liability and damages for trial by the same jury, finding bifurcation would result in economy of time for everyone (1 Tr. 31-32). Respondents then moved to exclude Petitioner Adam Bremner from the courtroom during the liability phase of trial. The court reserved its ruling.

Following presentation of Petitioners' case-in-chief, for the first time Petitioners asked that the trial court allow Petitioner Adam Bremner to enter the courtroom for a brief

appearance to allow the jury to view him. The court denied Petitioners' motion. The court did not hold a hearing on this issue, but it did have a significant amount of information upon which to base an informed decision.

The trial court made its exclusion ruling on the sixth day of trial. By that time the court had heard detailed testimony from numerous medical experts about perinatal asphyxia, hypoxia, neurological problems, and damage to Petitioner Adam Bremner's brain. There was evidence that Petitioner Adam Bremner suffered eight to twelve seizures per day.

There was no dispute that he could not comprehend or meaningfully participate in the proceedings or assist his lawyers (Appellants' Brief, p. 25). There was no suggestion that the jurors' observations of Petitioner Adam Bremner

would have helped them to understand the evidence. In short, there was nothing in the record about how Petitioner Adam Bremner's personal presence in the courtroom could have aided the jury in determining whether Respondents were negligent and, if so, whether that negligence caused Petitioners' injuries. Petitioner Deborah Bremner, Adam Bremner's guardian *ad litem,* was present throughout trial.

In denying Petitioners' motion for a jury view of Petitioner Adam Bremner, the trial judge found:

> I don't see how Adam could meaningfully participate in this. He has no awareness of what's going on. He can't testify. He is represented by his mother who is his guardian for the purposes of trial. I think insofar as this [liability] phase is concerned . . . I don't think I will permit him to come on in because I think the sole purpose of that would be to prejudice the jury.

(6 Tr. 1103-04.)

Following nearly three weeks of trial on the liability issue, the jury rendered a unanimous defense verdict. Thereafter Petitioners appealed. The Oregon Court of Appeals reversed the trial court and remanded for new trial, finding that the trial judge's rulings on bifurcation and exclusion amounted to an abuse of discretion. Bremner v. Charles, 104 Or. App. 75, 799 P.2d 188 (1990).

The Oregon Supreme Court disagreed with the Court of Appeals. Finding that the trial judge made an informed decision in ordering bifurcation and exclusion, the Oregon Supreme Court reversed the Court of Appeals and reinstated the trial court verdict. Bremner v. Charles, 312 Or. 274, 281, 821 P.2d 1080 (1991).

Neither court's decision analyzed nor turned on constitutional principles. In footnote 11 the Oregon Supreme Court noted that at trial Petitioners' counsel

had argued two provisions of the Oregon Constitution--article I, section 10, and article VII, section 3--entitled Petitioners to the proposed jury view. 312 Or. 274, 281, n.11. The Oregon Supreme Court went on to note correctly that Petitioners' opening brief failed to assign as error any constitutional issue regarding a civil party's right to be present during a jury trial. Id. As a result of Petitioners' waiver, the Oregon Supreme Court declined to address such state constitutional issues. Id.

Petitioners sought reconsideration in the Oregon Supreme Court. The Oregon Trial Lawyers Association (hereinafter "OTLA") and the American Civil Liberties Union Foundation of Oregon (hereinafter "ACLU"), *amicus curiae*, filed briefs arguing only that state constitutional issues had been preserved for review by the state supreme court. On

reconsideration the Oregon Supreme Court adhered to its original opinion. Bremner v. Charles, 313 Or. 339, 832 P.2d 451 (1992). At no time in the Oregon trial or appellate courts did Petitioners ever make any argument that the trial court's ruling violated any federal constitutional provision, including the seventh and fourteenth amendments.[4]

RESPONSE TO PETITION

1. This Court is Without Jurisdiction

A. No Federal Question

Because this case involves a petition for *certiorari* from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to this case, 28 U.S.C. § 1257 requires

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4. Petitioners' failure to raise a federal question explains Petitioners' inability to comply with Supreme Court Rule 14.1(h).

that in the state courts Petitioners must have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which they now seek to have this Court enforce. 28 U.S.C. § 1257(3). See Rules 10.1 and 14.1(h).

Petitioners failed to raise any issue of federal constitutional proportion. The Oregon courts were not presented with, nor did they decide, any question concerning violation of the seventh and fourteenth amendments of the United States Constitution. In the absence of any federal question in the state courts below, this Court's jurisdiction fails. Cardinale v. Louisiana, 394 U.S. 437, 439, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969); Webb v. Webb, 451 U.S. 493, 496-97, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) (Court dismissed writ, stating jurisdiction to

review final judgment of state court case arises only if record as a whole shows that federal claim was adequately presented in state system).

B. **Pending State Court Matters**

Jurisdiction also fails in the absence of a final judgment. 28 U.S.C. § 1257(a). In an unprecedented procedural move on August 3, 1992, Petitioners filed a notice of appeal to the Oregon Court of Appeals (Oregon Court of Appeals No. A76526) from the Oregon Supreme Court's Appellate Judgment, a nonappealable judgment. Although the Oregon Court of Appeals has issued an order dismissing the appeal, that dismissal is not final until issuance of appellate judgment (Oregon Rules of Appellate Procedure 14.05), which has not occurred as of October 15, 1992.

2. Petitioners Failed to Preserve Any Error Concerning Violation of Either the Seventh or Fourteenth Amendment

This case is a study in the failure to preserve error for appellate review. Specifically, Petitioners' opening brief in the Oregon Court of Appeals did not raise any constitutional challenges to the trial court ruling excluding Petitioner Adam Bremner from the liability portion of the bifurcated trial. Nor did it contain the arguments formulated exclusively in this Court that the trial court's ruling violated the seventh and fourteenth amendments of the United States Constitution. The Oregon Court of Appeals did not decide the issue on any constitutional ground.

Like the Oregon Court of Appeals, the Oregon Supreme Court decided the exclusion issue as a discretionary trial court procedural ruling. That court merely noted Petitioners had failed to

assign as error any constitutional challenge and stated, therefore, it did not decide any question concerning constitutionality under provisions of the Oregon Constitution.

A. This Court Will Not Review an Error Not Preserved Below

This Court has consistently held it will not, and indeed cannot, consider issues raised for the first time by the petition for certiorari. See Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); Tacon v. Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973) *(per curiam)*.

In Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981), the Court held the petitioner's use of the phrase "full faith and credit" at several points in the proceedings below was insufficient to preserve a claim under the Full Faith and Credit Clause of the

federal constitution in her petition for *certiorari*. The Court stated litigants must present federal issues first in the state court system, not only as a matter of comity, but in order to afford parties the opportunity to develop the record necessary for adjudicating the issue, and to permit the state courts to construe state statutes so as to avoid or obviate federal constitutional challenges, as well as to identify independent and adequate state grounds that would avoid the federal issue. 451 U.S. at 500. Because the petitioner had not raised her constitutional challenge in the state court, the Court held it was without jurisdiction and dismissed. 451 U.S. at 496, 501-502.

B. Petitioners Did Not Base Their "Exclusion" Assignment of Error on Any Purported Constitutional Violation

In their brief to the Oregon Court of Appeals Petitioners phrased the question presented by the trial court's denial of permission to bring Adam Bremner into the courtroom as follows:

> 2. Whether a non-disruptive party may be totally excluded from his or her personal injury trial, and if so, based on what criteria?

(Appellants' Opening Brief, p. 1). Petitioners mentioned no constitutional issues, and did not suggest that the answer depended on whether or not the trial was to a jury. Similarly, Petitioners' summary of argument on that ruling did not mention any constitutional arguments, nor did it assert any rights associated with that of trial by jury. In fact, the summary contained no hint of a claim that the presence of a jury might be an independent reason for refusing to

exclude a party (Appellants' Opening Brief, pp. 2-4).

Rule 5.45 of the Oregon Rules of Appellate Procedure prescribes the requirements for assigning error in Oregon appellate courts as follows:

> (2) No matter assigned as error will be considered on appeal unless it was preserved in the lower court and assigned as error in the party's opening brief; . . . .
>
> . . . . .
>
> (4) Each assignment of error . . . must be specific and must set out verbatim the pertinent portions of the record, if it relates to a specific ruling that is being challenged.

The well-established rule in Oregon is that constitutional issues will not be considered on appeal if they were not preserved at trial.[5] Petitioners

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5. See, e.g., Highway Com. v. Helliwell, 225 Or. 588, 591, 358 P.2d 719 (1961) (citing cases); Junck v. Wright, 94 Or. App. 704, 708, 767 P.2d 100, rev denied 308 Or. 465 (1989).

assigned as error the trial court's ruling that Adam Bremner could not be brought into the courtroom (Appellants' Brief, pp. 22-25). Nonetheless, Petitioners did not, in their opening brief, either in the assignment of error or in the supporting argument, quote or otherwise direct the court's attention to any "pertinent" portion of the trial record which might demonstrate a constitutional basis for their position.

Nor did Petitioners argue in their opening brief that the trial court's ruling on exclusion violated any constitutional right. Their only constitutional reference was an oblique referral to the Oregon Constitution:

> Plaintiffs contend that the safer course for the protection of a party's rights under Or Const Art I, sections 10 and 17 and Art VII, section 3, and for the well being of the jury system, is charted by Marks v. Mobil Oil Corp., 562 F Supp 759, 768 (ED Pa 1983)

> [*aff'd* 727 F.2d 1100 (3d Cir. 1984)].[6]

(Appellants' Opening Brief, p. 24.)

Oregon courts require far more before constitutional issues will be held to have been properly raised. A constitutional claim, the Oregon Supreme Court has said:

> [S]hould identify the provisions of the constitution, state and federal, that the governmental action is said to contravene and should show the relevance of these provisions to the claim.

Megdal v. Board of Dental Examiners, 288 Or. 293, 296, 605 P.2d 273 (1980).[7]

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6. Marks v. Mobil Oil Corp. was not a constitutional ruling. It relied specifically on the trial court's discretion to control the administration of courtroom proceedings. 562 F. Supp. at 768.

7. And see Fifth Avenue Corp. v. Washington Co., 282 Or. 591, 594, n.2, 581 P.2d 50 (1978) ("The use of this type of generalized constitutional attack without reference to specific textual provisions has been persuasively criticized . . ." [emphasis added]).

In this case Petitioners' opening brief did not argue that the trial court's exclusionary ruling violated a constitutional right. Instead Petitioners made a general argument based on policy and on nonconstitutional authorities. They told the court in passing that when deciding those nonconstitutional issues the "safer course" would be to keep in mind a laundry list of constitutional provisions (Appellants' Brief, p. 24). However, they did not identify any constitutional language on which they intended to rely, nor did they explain how they believed the trial court's ruling excluding Petitioner Adam Bremner from the courtroom had violated any particular constitutional provision.

Petitioners simply never asked the court of appeals for a constitutionally-based ruling on their assignment of error

directed to the exclusion of Petitioner Adam Bremner from the courtroom. The Oregon Supreme Court was entirely correct when it said:

> On appeal, however, no assignment of error raises or relies on constitutional issues about a civil party's right to be present during a jury trial.

312 Or. 274, 281, n.11.

C. Petitioners Did Not Raise or Preserve Any Federal Question

Petitioners' federal constitutional arguments concerning the seventh and fourteenth amendments appear for the first time in their petition for *certiorari*. In fact, Petitioners' only reference in the Oregon state courts to any federal constitutional provision was a comparison made in support of their recitation of Oregon State constitutional provisions:

> The sanctity of a jury trial is even more staunchly vouchsafed in Oregon than in

> the the [sic] federal system. Oregon Constitution Article VII, Sec 3, provides:
>
> "In all [sic] actions at law, where the value and [in, sic] controversy shall exceed $200, the right of Trial [sic] by Jury [sic] shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the [this, sic] state, unless the court can affirmatively say there is no evidence to support the verdict."
>
> That provision is nearly identical to the 7th Amendment of the United States Constitution. The Oregon Constitution, however, also uses stronger language to guarantee the right to the jury trial existing at the time of statehood. Article I, Sec 17 provides that:
>
> "In all civil cases the right of Trial by Jury shall remain inviolate."

(Appellants' Brief, p. 16.)

Petitioners never advanced any seventh amendment-based argument until filing the petition for writ of

certiorari in this Court.[8] The passing reference in the state court brief is not sufficient under any analysis to preserve the asserted error for this Court's review. Webb v. Webb, supra, 451 U.S. 493, 496. Petitioners never so much as cited the fourteenth amendment in relation to the exclusion of Petitioner Adam Bremner from the liability phase of the bifurcated trial at any stage of the state court proceedings.

On this record Petitioners' argument that they preserved any federal question in Oregon state courts is untenable. Petitioners' position on reconsideration

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8. Consequently, Petitioners make no effort to identify any place in the trial court in which the federal questions were raised, or to discuss the manner in which the Oregon courts passed upon the question, in violation of Rule 14.1(h). In fact, Petitioners cannot satisfy these provisions because the issues were never raised or decided.

in the Oregon Supreme Court was clear and echoed by *amicus curiae:*

> It is clear, therefore, that plaintiffs were contending that his exclusion from the courtroom was an abridgement of rights protected by the Oregon Constitution.

(OTLA *Amicus* Brief, p. 4.)

> This right, plaintiffs asserted, "inheres in [Adam Bremner's] status as a party" and is bottomed on Or Const Art I, sections 10 and 17 and Art VII, section 3.

(ACLU *Amicus* Brief, p. 3.) According to Petitioners and their supporters in the Oregon Supreme Court, Petitioners had preserved <u>state</u> constitutional challenges for review. Nothing was said about any federal constitutional violation.

This Court should deny the petition for *certiorari*. No federal question has been preserved for review.

3. Petitioners Were Not Deprived of Any Seventh Amendment Right to Jury Trial

A. The Seventh Amendment Does Not Apply to State Court Actions

Even if Petitioners had not waived their right to raise the argument regarding violation of the federal constitutional right to a jury trial, their reliance on the seventh amendment to the United States Constitution is nonetheless misplaced. While various amendments in the Bill of Rights have been applied to the states by incorporation into the fourteenth amendment, the seventh amendment right to a jury trial in civil cases has never been so incorporated or applied to the

states.[9] Petitioners cite no case to the contrary.

The cases that Petitioners do cite have no application to this state court civil action:

(1) Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943), a civil action for benefits under a federal war risk insurance policy brought in federal court, held that the seventh amendment right to a trial by jury did not deprive federal courts of the power to grant a directed verdict based on insufficiency of the evidence.

(2) Dimick v. Schiedt, 293 U.S. 474, 485, 55 S. Ct. 296, 79 L. Ed. 603 (1935), a diversity action brought in federal court for personal injuries, held

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9. In fact, according to Petitioners' own petition, seventh amendment analysis is replete with the observation that the amendment does not apply to the states (Petition, p. 17).

that the defendant was not deprived of the right to a trial by jury as the result of a trial court ruling granting plaintiff a new trial unless defendant agreed to pay $1,500 in damages.

(3) Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 707 (1969), a criminal case which originated in state court, held that the fifth amendment's double jeopardy clause applied to a state criminal actin via the fourteenth amendment.

Even if Galloway, supra, and Dimick, supra, advanced Petitioners' case on the merits, which they do not, their holdings apply only to federal court actions, not to this state court case. Neither Benton nor any other case has ever incorporated the United States Constitution's seventh amendment right to a civil jury trial into the fourteenth amendment, thus

applying it to the states, as Petitioners now urge.

B. Petitioner Adam Bremner Was Afforded a Jury Trial

Whether or not the seventh amendment is incorporated in the fourteenth amendment, and thereby made applicable to state civil jury trials, the result here would be no different. In this case Petitioner Adam Bremner did receive a jury trial. Petitioner Adam Bremner's guardian *ad litem* was present during the entire trial. Petitioner Adam Bremner would have had an opportunity to be present at trial if a damages phase was necessary.

Petitioners point to no case under either the seventh amendment or Oregon law to support their argument their right to a jury trial here was in any way infringed. Petitioners have utterly failed to establish any ground to support

United States Supreme Court review of this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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